

2010

Jeff Benedict's Little Pink House: The Back Story of the Kelo Case Book Review

George Lefcoe

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Lefcoe, George, "Jeff Benedict's Little Pink House: The Back Story of the Kelo Case Book Review" (2010).
Connecticut Law Review. 61.
https://opencommons.uconn.edu/law_review/61

CONNECTICUT LAW REVIEW

VOLUME 42

FEBRUARY 2010

NUMBER 3

Book Review

Jeff Benedict's *Little Pink House*: The Back Story of the *Kelo* Case

GEORGE LEFCOE

Little Pink House is a fast paced account by Jeff Benedict of the events surrounding the 2005 U.S. Supreme Court decision in *Kelo v. City of New London*. At the core of the tale is how *Kelo* and a handful of her neighbors challenged the New London Development Corporation's ("NLDC") use of eminent domain for the economic redevelopment of the Fort Trumbull neighborhood. A libertarian-inspired public interest law firm named the Institute for Justice ("IJ") agreed to represent the beleaguered property owners. IJ challenged the notion that economic development could be regarded as a public use. IJ also unfurled an effective national public relations campaign against what it dubs eminent domain abuse. Benedict gives us front row seats to see how the media drama unfolded.

Though IJ triumphed in the court of public opinion, it lost the *Kelo* case in the Connecticut and U.S. Supreme Courts. A majority of judges in both courts flatly rejected IJ's contention that takings for economic development were not for a public use.

This Book Review spotlights four important aspects of the *Kelo* back story that have been largely overlooked. First, IJ's masterful media campaign accentuated NLDC's shortcomings while dismissing its sizable accomplishments in the rehabilitation of Fort Trumbull. Second, most of the disputed properties were being acquired to widen roads, a prototypical public use. This Book Review explains why New London's counsel chose not to rely on this fact in making its case before the U.S. Supreme Court. Third, the trial court had ruled in favor of *Kelo* and some of the other plaintiffs in their eminent domain challenge. *Kelo* was forced out after IJ decided to appeal this decision and lost on appeal. The appeal enabled IJ to keep the *Kelo* dispute in the public eye, a good thing for a public interest law firm like IJ that needs to raise funds for its cause. But the appeal resulted in a reversal of the trial court's opinion that would have allowed *Kelo* to keep her house. Readers can assess for themselves whether the decision to appeal was taken in a professionally responsible way. Fourth, *Kelo* and the other plaintiffs ended up negotiating hefty settlements with the Governor of Connecticut that were two to three times fair market value, the basis on which most of the other property owners in Fort Trumbull were compensated. This Book Review details the extent of over compensation, and how it came about. The author obtained much of the information in this paper through interviews and correspondence with New London officials and attorneys over a period of several years.

BOOK REVIEW CONTENTS

I. INTRODUCTION: <i>THE BASIC STORY LINE</i>	927
II. KELO ACQUIRES HER LITTLE PINK HOUSE	928
III. FORT TRUMBULL BEFORE	929
IV. SPINNING KELO AND FORT TRUMBULL: BENEDICT AND IJ—CLOSE BUT NOT IDENTICAL	930
V. FORT TRUMBULL AFTER NLDC	933
VI. PROPERTY TAXES FROM THE FORT TRUMBULL AREA THEN AND NOW	936
VII. THE DEVELOPMENT IN FORT TRUMBULL’S FUTURE	938
VIII. THE DEBATE ABOUT THE PROPER PLACE OF LOCAL GOVERNMENTS IN LAND DEVELOPMENT	940
IX. IJ’S REPRESENTATION OF KELO AND OTHERS	941
X. HOW IJ’S APPROACH DIFFERS FROM THAT OF MOST EMINENT DOMAIN LAWYERS	942
XI. THE DECISION TO APPEAL THE TRIAL COURT DECISION	944
XII. THE DOCTRINE OF NECESSITY	947
XIII. THE DISPUTE AMONG NEW LONDON’S ATTORNEYS OVER HOW BEST TO FRAME THEIR CASE BEFORE THE U.S. SUPREME COURT	948
XIV. THE U.S. SUPREME COURT MAJORITY OPINION	949
XV. LITIGATING IN THE COURT OF PUBLIC OPINION	950
XVI. DEFINING “JUST COMPENSATION”: WHY COURTS TEND TO REJECT REPLACEMENT VALUE AS THE NORM ...	952
XVII. THE FINAL SETTLEMENT WITH THE HOLDOUTS	953
XVIII. KELO’S SETTLEMENT AFTERMATH	954
XIX. CONCLUSION: THE LAST WORD	956



Jeff Benedict's *Little Pink House*: The Back Story of the *Kelo* Case

GEORGE LEFCOE*

I. INTRODUCTION: *THE BASIC STORY LINE*

Little Pink House is an engrossing account by nonfiction writer Jeff Benedict of the events surrounding the 2005 U.S. Supreme Court decision in *Kelo v. City of New London*. Jeff Benedict sets out to tell “the stirring story behind what drove Susette Kelo—a divorced nurse—to take on a powerful governor, a billion-dollar corporation, and a hard-charging development agency to save her pink cottage . . . [I]t is a hidden drama that begs to be exposed.”¹ Though Jeff Benedict has a law degree, he is not a practicing lawyer and touches only lightly on the legal and policy issues of the *Kelo* case. Instead, he offers a gripping account of the behind-the-scenes maneuvering in the case from start to finish.

This Book Review traces Benedict's account. He briskly depicts Susette Kelo's determined resistance to being displaced and recounts the efforts of New London's civic leadership to lift one of the city's most distressed neighborhoods out of the economic doldrums. Benedict's sympathies reside entirely with Kelo against New London's political establishment. He lauds the efforts of Kelo's attorneys to save her home from eminent domain and endorses the opinion of dissenting Supreme Court Justice O'Connor,² while barely mentioning the majority holding of the U.S. Supreme Court and its bearing on New London's aspirations.

At the core of the tale is how a libertarian-inspired public interest law firm named the Institute for Justice (“IJ”) agreed to represent a small band of beleaguered property owners, challenged the New London Development Corporation's (“NLDC”) use of eminent domain for the economic redevelopment of the Fort Trumbull neighborhood, and overwhelmed NLDC with a blistering public relations campaign. IJ's media message portrays heartless government bureaucrats flouting the Constitution's “public use” requirement by condemning private homes and small

* Ervin and Florine Yoder Chair of Real Estate Law, Gould School of Law, University of Southern California, Los Angeles, CA. The author gratefully acknowledges the thoughtful research of Kevin Kelly, USC Law 2010, deft editing by Bill Givens and Katherine Guevarra, insightful observations by Edward O'Connell, John Brooks, and Tom Londregan of how New London city officials saw the case and its outcomes, and masterful lawyering by Dana Berliner and Scott Bullock, whose work set off an avalanche of *Kelo* scholarship for which we participants owe them an especially hearty thanks.

¹ JEFF BENEDICT, *LITTLE PINK HOUSE* ix (2009).

² See *id.* at ix–x.

businesses for the benefit of greedy private developers and big corporations.³

IJ chose Kelo as its lead plaintiff. Instead of listing alphabetically all the parties it represents in a particular lawsuit, as do most litigators, IJ carefully selects the first party to be named in each of its cases with an eye to the lead plaintiff becoming a spokesperson for the case and the property rights cause.⁴ Kelo proved to be an excellent choice, a strong-willed homeowner who became a convincing national advocate for property rights.

II. KELO ACQUIRES HER LITTLE PINK HOUSE

Benedict promises to tell us what drove Kelo to take on city hall. He starts by depicting her acquisition of the Little Pink House. Before she acquired it, she had tried to convince her then-husband to sell their ranch style home in rural Preston, Connecticut. She sought to tempt him with a property she happened to spot one day, a house with a private dock and a small patch of beach in a waterfront community on the Long Island Sound.⁵ He would not budge. The Preston house was fifteen minutes from where he worked and the beach house was an hour away from his work. “‘I’m going to ask you for the last time,’ she said in desperation. ‘I’m not leaving Preston,’ he said.”⁶

She finally settled on what became the Little Pink House—8 East Street, New London—because of its partial waterfront view and affordability.⁷ The house was set on a postage stamp lot little bigger than the house itself.⁸ It had two bedrooms upstairs and a bathroom on each floor.⁹

In the 1980s, Avner Gregory, an ardent preservationist, had refurbished the century-old home and sold it to an investor.¹⁰ Unfortunately, the investor let the house deteriorate, unoccupied. By the time Kelo spotted a broker’s “For Sale” sign on the place, the house had lingered on the market for years. The yard was so overgrown with brush and weeds, Kelo had to cut back the overgrowth just to reach the front door.¹¹

Kelo was not shy when it came to negotiating the purchase price. The

³ See *id.* at 292 (describing a research paper sponsored by IJ entitled “Public Power, Private Gain” that was given to the television program, *60 Minutes*, to highlight nationwide takings for the benefit of private use).

⁴ *Id.* at 200.

⁵ *Id.* at 4–5.

⁶ *Id.*

⁷ *Id.* at 8.

⁸ *Id.* at 14–15.

⁹ *Id.* at 12.

¹⁰ *Id.* at 15.

¹¹ *Id.* at 13.

property had been listed at \$59,000. Her opening bid was \$42,000—\$17,000 below list. The owner countered at \$56,000. Kelo had been pre-approved for a first-time home buyer's loan for up to \$53,500—and \$56,000 is the price she agreed to pay—provided the seller reimbursed her for a paint job and closing costs. Kelo managed to borrow her down payment of \$2500 from a friend.¹²

Kelo cleaned up the overgrown yard, painted the house “Odessa Rose” (a pinkish, salmon color), replaced the curtains and window shades, puttied all the nail holes, stripped and refinished the hardwood floors, painted the molding, and stained the stairs.¹³

III. FORT TRUMBULL BEFORE

Benedict carefully traces how Kelo's house ended up in condemnation. The saga began with a decision taken by the former Governor of Connecticut, John G. Rowland, a Republican, to woo traditionally Democratic voters by offering massive state funding to jump-start economic development projects in working class towns suffering high unemployment rates and declining property tax rolls.¹⁴

New London was one of those towns that needed a boost.¹⁵ Contributing to New London's job losses, the Navy had a big payroll there until Congress shuttered the local naval underwater research center in 1995. After that, “the [Fort Trumbull] neighborhood began to resemble a ghost town.”¹⁶

As part of its politically wrenching, cost-cutting base closure moves, Congress urged communities across the country to replace lost military jobs by stimulating new economic redevelopment.¹⁷ Governor Rowland and his advisors decided to do just that. To spearhead the revitalization program, Governor Rowland resuscitated the long moribund quasi-public,

¹² *Id.* at 12, 14, 16.

¹³ *Id.* at 26, 36, 41–42.

¹⁴ *Id.* at 9. By July 2004, months before the U.S. Supreme Court would agree to hear the *Kelo* case, federal prosecutors indicted Governor Rowland on corruption charges for which he was sentenced to a year and a day in prison. He resigned as governor just before the indictment and was promptly replaced by the former Lieutenant Governor Jodi Rell. *Id.* at 299–300, 376.

¹⁵ The Environmental Impact Evaluation, completed in November 1998, reported higher unemployment rates in New London than in neighboring towns or state-wide, a city economy outperformed by the region and state, a sharply declining labor market, and an older housing stock riddled with vacancies. *Kelo v. New London (Kelo I)*, No. 557299, 2002 Conn. Super. LEXIS 789, *119–20 (Conn. Super. Ct. Mar. 13, 2002).

¹⁶ BENEDICT, *supra* note 1, at 15–16.

¹⁷ Congress authorized the Department of Defense to close and realign bases. 10 U.S.C. § 2687 (2006). At the same time, the Department of Defense was authorized to encourage and assist localities impacted by closures to seize the opportunity and replace lost jobs and local tax revenues through vigorous economic redevelopment. See TADLOCK COWAN & BAIRD WEBEL, CONG. RESEARCH SERV., MILITARY BASE CLOSURE: SOCIOECONOMIC IMPACTS 5 (2005), available at <http://www.fas.org/sgp/crs/natsec/RS22147.pdf>.

non-profit NLDC.¹⁸ He could have chosen to funnel state funds through the city's redevelopment agency but preferred to work with an entity not beholden to New London's Democratic Party leaders. As chair of NLDC's volunteer board, the Governor designated the nationally respected scholar Claire Gaudiani. At the time, Gaudiani was President of the prestigious Connecticut College.¹⁹ NLDC's mission could be described as converting a nineteenth century industrial wasteland into a place that would appeal to firms employing "knowledge workers": scientists and engineers, artists and writers, and professionals and managers, an ensemble dubbed the "[c]reative class[es]" of the twenty-first century.²⁰

IV. SPINNING KELO AND FORT TRUMBULL: BENEDICT AND IJ—CLOSE BUT NOT IDENTICAL

Though Benedict embraces IJ's David-and-Goliath characterization of the struggle between the *Kelo* case holdouts and NLDC, his depiction is necessarily more nuanced than theirs. Benedict's goal was to write a story that might form the basis of a screenplay.²¹ Dahlia Lithwick, a *New York Times* reviewer, put it this way: "The investigative reporter Jeff Benedict has decided to cast Kelo in the style of Julia Roberts as Erin Brockovich."²² To be believable, movie characters need to be three-dimensional.²³ Their flaws can command the viewer's attention and empathy. In overcoming their flaws, well-drawn characters give a sense of direction to the story.²⁴ Actor Christian Bale makes an important point when he explains that an audience does not have to approve of an author's characters but they have to relate to them.²⁵ Dislikable characters can enliven a script as long as they possess at least one redeeming

¹⁸ In Connecticut, state funds can be funneled to municipalities through one of two statutory vehicles: (1) economic development (Municipal Development Project), Chapter 132, or (2) redevelopment (Redevelopment and Urban Renewal), Chapter 130. See CONN. GEN. STAT. § 8-190 (2008) (granting the commissioner authorization to make grants to facilitate development programs); *Id.* § 8-195 (2008) (establishing special planning grants for municipal development projects); *Id.* § 8-135 (2008) (authorizing municipalities to levy taxes, utilize grants, or other avenues to carry out a redevelopment plan). Governor Rowland chose the former because once a city forms a non-profit economic development corporation, its board is self-perpetuating. Practically, this meant that the Governor would be able to designate the board of the New London Development Corporation, and not the New London City Council. Had the governor proceeded under Chapter 132, the New London City Council would have been entitled to designate the agency and name the individuals in charge of the redevelopment effort.

¹⁹ BENEDICT, *supra* note 1, at 18, 20.

²⁰ See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* 67–68 (2002).

²¹ See Stephen Chupaska, *Journey of a Writer*, MYSTIC TIMES, May 28, 2009, at 17 ("Benedict admitted that the story behind *Little Pink House* would translate better as a film than a book.").

²² Dahlia Lithwick, *Driven Out*, N.Y. TIMES, Mar. 15, 2009, at BR17.

²³ See RAY FRENTHAM, *TEACH YOURSELF SCREENWRITING* 74 (2008).

²⁴ See *id.* at 89 ("Take one aspect of your own [writer's] character that you're not particularly proud of and explore that, push the envelope to the limit." (quoting author Kingsley Amis)).

²⁵ *Id.* at 93.

characteristic (remember Matt Damon as Mr. Ripley in *The Talented Mr. Ripley*?).²⁶

The challenge for public interest lawyers is to shake individuals “away from their ordinary state of passivity and to act collectively.”²⁷ Public interest advocates need to “single out an existing social condition and redefine as unjust what was previously viewed as unfortunate, yet tolerable.”²⁸ They need to engage in framing—*naming* the problem, *blaming* someone for it, and *claiming* a solution for the perceived grievance.²⁹

Consistent with the technique of naming, blaming, and claiming, when Chip Mellor founded IJ in 1991, “he developed a simple formula for selecting cases: (1) sympathetic clients; (2) outrageous facts; and (3) evil villains.”³⁰ He avoids nuances or complexities that would distract from the clarity of IJ’s vigorous media message—its dedication to protect property owners from their property being taken to benefit other private owners.

Litigation public relations expert and practicing attorney, James Haggerty, would endorse Chip Mellor’s approach. Haggerty advises clients to: (1) “[s]hed the layers of complexity that often envelop your particular legal issue”; (2) “[r]efrain from qualifying, differentiating, or otherwise anticipating and refuting opposing arguments”; and (3) “[l]ead with your conclusion, not with your factual argument.”³¹

The differences between what it takes to write a good screenplay and how public interest lawyers need to depict events becomes clear when one compares the disparate ways Benedict and IJ characterized the Fort Trumbull area before and after NLDC’s intervention. To IJ’s attorney Scott Bullock, who “had grown up in the economically devastated Pittsburgh of the seventies and eighties, the Fort Trumbull neighborhood didn’t look depressed to him.”³² An IJ summary asserts, “The richness and vibrancy of this neighborhood reflects the American ideal of community and the dream of homeownership.”³³

By contrast, Benedict describes the neighborhood’s “tough appearance” as “[a] hodgepodge of industrial properties, warehouses, and old, small homes, the Fort Trumbull neighborhood was cut off from the

²⁶ *Id.* at 91.

²⁷ Lynn Jones, *The Haves Come Out Ahead: How Cause Lawyers Frame the Legal System for Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 182, 184 (Austin Sarat & Stuart A. Scheingold eds., 2006).

²⁸ *Id.*

²⁹ *Id.* at 185.

³⁰ BENEDICT, *supra* note 1, at 199.

³¹ JAMES HAGGERTY, IN THE COURT OF PUBLIC OPINION 78 (2003).

³² BENEDICT, *supra* note 1, at 167.

³³ Institute for Justice, *Kelo v. New London*, Lawsuit Challenging Eminent Domain Abuse in New London, Connecticut, <http://www.ij.org/> (follow “Case Information” hyperlink; then follow “Private Property Rights” hyperlink; then follow “New London, Connecticut” hyperlink) (last visited Jan. 26, 2010).

rest of New London, sandwiched between Amtrak rail lines on the west and the abandoned naval base on the north.”³⁴ Fort Trumbull was only a block from a smelly sewage treatment plant “which essentially consisted of some oversized cesspools,”³⁵ in one of New London’s scruffier locales, zoned industrial since 1928.³⁶

To the NLDC staff, Fort Trumbull had always been on the wrong side of the tracks, contained relatively few homes and businesses, and had many unpleasant uses that needed to be cleaned up. NLDC officials adamantly disputed intimations by the opposition that Kelo and her neighbors were going to be displaced to make way for high-end condos. “[T]he Municipal Development Plan never intended for the Kelo block to be reused for housing, in part because it was just across the street from the sewage treatment plant.”³⁷

In 1998, a nationally renowned engineering firm worked on both the Environmental Impact Evaluation and NLDC’s re-use plan for the area. It found that many properties suffered from deferred maintenance, and that

[l]ess than 12% of residential buildings in the MDP area . . . are considered in average or better condition. . . . [Thirty percent] are in poor condition. . . . As of February 19, 1999, 67 of the 115 dwelling units in the MDP (municipal development plan) area were occupied. Of these, only 15 were owner-occupied, with the remaining 52 renter-occupied. [Regarding the availability of replacement properties, a] review of published real estate listings in New London showed 19 homes for sale under \$70,000, and 23 homes for sale between \$70,000 and \$90,000.³⁸

³⁴ BENEDICT, *supra* note 1, at 15.

³⁵ *Id.* at 33.

³⁶ Interview with Tom Londregan, New London City Attorney (June 1, 2009). Early zoning laws established a pyramid of uses rooted in nineteenth century notions of nuisance law. RICHARD F. BABCOCK, *THE ZONING GAME, MUNICIPAL PRACTICES AND POLICIES* 4 (1966). Homes were protected by “residential” zoning. Houses could be built in commercial zones (e.g., retail), the center of the hypothetical zoning pyramid. The least protected areas were zoned industrial. There, property owners could build virtually anything. *See id.* at 127. Poorly paid workers inhabited houses and trailers located in industrial zones from which they could walk to work if they were fortunate enough to find a job in the area. *See id.* at 127–28. Early zoning’s reliance on cumulative zoning resulted in industrial zones becoming a community “garbage pail” for all the uses that could not qualify for placement in “higher” zones, including residential uses such as trailer parks. *Id.* Later, many localities revised their ordinances by establishing purely industrial zones once they discovered that housing and commercial uses made an area unattractive to operators of prime industrial facilities. “Generally, noncumulative zoning ordinances have replaced cumulative zoning ordinances, reflecting changed beliefs about compatibility.” STUART MECK & KENNETH PEARLMAN, *OH. PLAN. & ZONING L.* § 8:39 (14th ed. 2009). New London never did this in the Fort Trumbull area.

³⁷ E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (July 21, 2009, 13:27 PST) (on file with author) [hereinafter Brooks, July 21 E-mail].

³⁸ NEW LONDON DEV. CORP., *FORT TRUMBULL MUNICIPAL DEVELOPMENT PLAN*, at app. A, 8–9 (2000).

V. FORT TRUMBULL AFTER NLDC

The individual who deserves credit for doing the most to turn around the area was NLDC Board Chair Claire Gaudiani. While IJ's Bullock dismisses Claire Gaudiani as "almost a parody of a condescending, collectivist academic,"³⁹ Benedict depicts Gaudiani as a worthy screenplay antagonist for Kelo. He describes Gaudiani as ambitious, focused and intense,⁴⁰ attractive, and sometimes seductive, with more than a touch of arrogance.⁴¹ "One of [the] themes that emerges is the conflict between two remarkably strong women, the glamorous, accomplished, imperious Gaudiani and nurse/homeowner Susette Kelo, a divorced woman from a hardscrabble background who had gone through much to buy her 'little pink house' and would not leave it."⁴²

Perhaps the most significant difference between Benedict's account and the IJ's is that Benedict acknowledges the importance of Pfizer's decision to build its impressive office and research facility in New London, and the key role of Claire Gaudiani in negotiating the deal between Governor Rowland and the pharmaceutical firm.⁴³ A Hartford Courant reviewer of Benedict's book summarized Gaudiani's accomplishment well: "Getting Pfizer to commit to buil[d] a \$300 million complex on a brownfield next to a junkyard and a sewage treatment plant might have qualified for the Nobel Prize in economic development, were there one"⁴⁴ As a result of this single transaction, Pfizer New London would bring 2000 new jobs to more than offset the 1500 jobs that had been lost to the naval base closure.⁴⁵

As part of its agreement with Pfizer and NLDC, the State of Connecticut agreed to pay for cleaning up the New London Mills property that had piles of rubble atop land contaminated with all sorts of industrial

³⁹ Scott Bullock, *The Patriots of Fort Trumbull*, LIBERTY & L., Dec. 2004, available at <http://www.ij.org/> (follow "Publications" hyperlink; then follow "Liberty & Law" hyperlink; then follow "December 2004" hyperlink; then follow "The Patriots of Fort Trumbull" hyperlink).

⁴⁰ BENEDICT, *supra* note 1, at 35.

⁴¹ *Id.* at 219.

⁴² Tom Condon, *Kelo Case a Planning Failure*, HARTFORD COURANT, Feb. 1, 2009, at C5.

⁴³ See BENEDICT, *supra* note 1, at 50 (describing Gaudiani's approach to Pfizer and the Rowland administration).

⁴⁴ Condon, *supra* note 42. Though Condon admires Gaudiani's achievement in landing Pfizer, he faults "Gaudiani, city officials and their state backers" for trying to "double down on the Pfizer investment by clearing and developing the 90-acre peninsula that adjoins the facility" and not trying to preserve the houses as part of a mixed-use project. *Id.* Instead, they went for a scorched earth policy, "a throwback to 1950s–1970s urban renewal projects, almost all failures (including, Benedict might have pointed out, a large project in downtown New London)." *Id.*

⁴⁵ Tedd Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, NEW LONDON DAY, Oct. 16, 2005, available at <http://www.freerepublic.com/focus/bloggers/1503363/posts>; see also *Kelo v. City of New London (Kelo III)*, 545 U.S. 469, 473 (2005) ("In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people.").

pollutants.⁴⁶ This abandoned site is where Pfizer's sparkling new research and development laboratory would be built.⁴⁷ Using NLDC as its conduit, the Governor extended additional millions of dollars in state funds to cap the cesspools at the sewage treatment plant so as to eliminate the sickening odors, buy out the owner of the adjoining scrap metal yard, widen the area's narrow roads, install sidewalks, rejuvenate Fort Trumbull State Park, and refurbish Fort Trumbull itself,⁴⁸ a structure that had been allowed to sink into great disrepair, becoming a "decaying fortress."⁴⁹

IJ realized that none of the condemnations were for Pfizer's direct use. But in order to conjure up an evil villain, it cast Pfizer as the great behind-the-scenes manipulator instead of as a concerned corporate citizen, eager to secure the best possible environment for its employees. In this situation, improving the urban environment in ways that would benefit Pfizer also produced benefits for New London residents in general.⁵⁰ Besides the indirect benefits of jobs and an increased tax base, John Brooks and William Busch list the public benefits:

The plan involved acquisition of significant fallow land (including a closed railroad yard and former oil terminal), removal of the obsolete buildings (especially on the closed Navy base), remediation of the soil (costing more than \$25 million), and installation of significant new public infrastructure to the area (\$15 million in new streets, sidewalks and utilities). It also included public amenities, such as the creation of a new state park around the historic Fort Trumbull (state investment of more than \$25 million), and a new public access waterfront walkway to enhance the redevelopment area.⁵¹

Residents and visitors can now enjoy the stunning waterfront from the newly refurbished Fort Trumbull and Fort Trumbull State Park.

These public benefits are of great legal significance. An economic development project qualifies as a public use even if it benefits private firms or individuals as long as the main beneficiaries are the general

⁴⁶ See BENEDICT, *supra* note 1, at 23, 52–53.

⁴⁷ *Id.* at 56.

⁴⁸ Conn. Dep't of Env'tl. Prot., Fort Trumbull State Park, <http://www.ct.gov/dep/cwp/view.asp?A=2716&Q=325200> (last visited Nov. 18, 2009).

⁴⁹ BENEDICT, *supra* note 1, at 14, 53.

⁵⁰ See *Kelo v. New London (Kelo II)*, 843 A.2d 500, 538 (Conn. 2004) ("[A]lthough a great deal of consideration was given to the various demands and needs created by the new Pfizer facility, this consideration was given for the purpose of making the development plan more beneficial to the city.").

⁵¹ John Brooks & William Busch, *Perception v. Reality, A Commentary on Media Bias and Eminent Domain*, RIGHT OF WAY, May/June 2008, at 20, available at <https://www.irwaonline.org/EWEB/upload/0508a.pdf>.

public,⁵² and in the Fort Trumbull project, the U.S. Supreme Court identified public benefits galore.⁵³

Exhibit 1



Exhibit 1 depicts the disputed parcels at the time of the U.S. Supreme Court decision in *Kelo*. The Pfizer buildings are at the bottom of the

⁵² See *Kelo II*, 843 A.2d at 541 (“Thus, we conclude that an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public.”); see also *Katz v. Brandon*, 245 A.2d 579, 586–87 (Conn. 1968) (“There is nothing in the record to indicate that any conveyance of land has been made to [a manufacturing corporation] or that any agreement or understanding exists which would provide it with any advantage which is not available to others who may be interested as redevelopers.”); *Bugryn v. Bristol*, 774 A.2d 1042, 1047 (Conn. App. Ct. 2001) (“Even if the taking [for an industrial park, an undisputed public use] would later provide a site for [a major local company], a consequence that would be neither undesirable to the defendants nor adverse to the goals that the park plan seeks to achieve, that fact would not support the plaintiffs’ claim [of a private taking] in light of the ample evidence in the record concerning the plan as a whole.”).

⁵³ As the Court in *Kelo* stated:

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Kelo III, 545 U.S. 469, 483–84 (2005) (footnotes omitted).

picture—six white office structures. In the center right hand portion of the photo is Fort Trumbull and Fort Trumbull State Park. Notice the new waterfront walk. Just to the left of the Fort Trumbull parking lot is Parcel 4A (the block containing the properties of Susette Kelo, Billy Von Winkle and Matthew Dery), wedged between the Fort and the sewage treatment plant. Parcel 3 (Beyer Pattaya Construction, Cristofaro, and Athenian-Brelevsky) lies above the center of the plant on the other side of the road—the parcel with small buildings barely visible on it.

Exhibit 2



Exhibit 2 shows the site as it looked in October 2008. Most of the structures have been removed from Parcels 3 and 4A. The stand-alone building in the center of the photo is 1 Chelsea Street, formerly part of the U.S. Naval Undersea Warfare Center. Boston-based redevelopers, Corcoran Jennison, spent \$24,000,000 refurbishing this 88,000 square foot property, and have successfully leased it, mostly as a research and development center. About 160 people work there.⁵⁴

VI. PROPERTY TAXES FROM THE FORT TRUMBULL AREA THEN AND NOW

In 2000, the combined tax assessed value of property within the Fort Trumbull planning area was \$10,000,000. By 2009, the total would be

⁵⁴ “One Chelsea Street—\$24 million Corcoran Jennison office project at Fort Trumbull—88,000 sq. ft.; prime tenant is USCG Research and Development Center (160 employees)—opened in 2009.” New London Dev. Corp., <http://www.nlde.org/> (last visited Jan. 26, 2010).

almost \$18,500,000.⁵⁵ This does not count the millions in property taxes that Pfizer and later owners will pay the city of New London on its \$300,000,000 facility.⁵⁶

Property taxes matter a lot in Connecticut, covering about sixty-five percent of local government expenditures.⁵⁷ Each of Connecticut's 169 towns and cities levies property taxes to cover its budget.⁵⁸ Taxed assets include all types of realty and certain items of personal property.⁵⁹ Assessed values are supposed to be seventy percent of fair market value, based on periodic re-appraisals.⁶⁰

To raise enough taxes to cover their projected expenses, cities and towns divide their budget by the total of assessed values on their Grand List to come up with a tax rate in mills. A mill is one thousandth of a dollar. To support budgeted expenditures of \$50,000,000 from \$2.5 billion in assessed values, a city would have to levy a millage rate of 20. Taxed at a millage rate of 20, a home valued at \$500,000 would be subject to a tax of \$10,000.⁶¹

Towns rich in property values levy lower tax rates than poorer locales. For instance, the millage rate in modest Waterbury is 40 while wealthy New Canaan's is less than 10.⁶² "Living in the inner cities, the poorest places in the state, is much more expensive due to the very high taxes."⁶³ Understandably, financially strapped cities endeavor to build up their property tax bases as best they can with new construction. As their redevelopment projects succeed, underfinanced cities may be reluctant to diminish their newly enhanced revenue stream by reducing their millage rates. But as their tax base grows, these cities are less likely to increase their tax rates, hoping eventually to bring their rates into line with competing cities.

⁵⁵ Students of Connecticut College, New London Development Corporation, Analysis of Real Property Taxes: Fort Trumbull MDP Area (unpublished data, on file with author).

⁵⁶ *Id.*

⁵⁷ CONN. CONFERENCE OF MUNICIPALITIES, LOCAL PROPERTY TAXES AND CONNECTICUT'S STATE GOVERNMENT (2006), available at www.ccm-ct.org/advocacy/propertytax/propertytaxbrochure.pdf.

⁵⁸ Conn. Office of Pol'y & Mgmt., Connecticut's Property Tax Framework, <http://www.ct.gov/opm/cwp/view.asp?a=2985&q=383128> (last visited Oct. 17, 2009).

⁵⁹ *Id.*

⁶⁰ CONN. GEN. STAT. §§ 12-62(b)(1), 12-62a(b) (2009); see also Conn. Office of Pol'y & Mgmt., *supra* note 58.

⁶¹ Conn. Office of Pol'y & Mgmt., *supra* note 58.

⁶² Posting of Roger to 1000 Friends of Connecticut Blog, <http://1000friends-ct.blogspot.com/2009/01/property-tax-i-basics.html> (Jan. 27, 2009, 07:17 EST).

⁶³ *Id.*

VII. THE DEVELOPMENT IN FORT TRUMBULL'S FUTURE

As IJ reminds us, the contested parcels remain vacant in New London and there are no immediate takers in sight.⁶⁴ As memories fade of the battle for the Little Pink House, so should the stigma that once attached to Parcels 4A and 3. Those assembled parcels are sizable and well located between the waterfront and the Amtrak line. They call to mind Londregan's explanation for older cities to be able to use eminent domain for economic development. Eminent domain gave cities a chance to compete with suburbia by assembling large tracts of land for redevelopment from many previously subdivided little plots. "Without the ability to assemble large tracts of land for economic development, New London was doomed."⁶⁵ How else were cities to find the tax base to support affordable housing, tax exempt schools, churches and government offices, social programs, mental health clinics, and the homeless?⁶⁶ No city in New England except Boston had a bigger percentage of its potential tax base—about fifty percent—exempt from the tax rolls, and Boston was ten times bigger than New London.⁶⁷ At least in this instance, NLDC assembled and cleared a well located site that will be ready for development when the real estate market rebounds.

Planning continues for the location of the U.S. Coast Guard Museum in Fort Trumbull.⁶⁸ John Brooks, Executive Director of NLDC, reports that plans are also advancing for a hotel that would cater to regional conventions and tourists.⁶⁹ "If there had been no litigation, which took

⁶⁴ IJ's Scott Bullock made this argument before the U.S. Supreme Court, but Wes Horton, New London's appellate counsel, noted that "Justice Scalia gave Scott a particularly hard time on that: Why do you want us to get involved in deciding whether it is going to work or not?" *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 296 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

⁶⁵ BENEDICT, *supra* note 1, at 266; see also J. Peter Bryne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 140 (2005).

⁶⁶ See BENEDICT, *supra* note 1, at 50 (discussing NLDC's plan to buy up property in order to create space for new businesses such as a five-star hotel and a state-of-the-art conference center as part of a grand plan for New London's redevelopment).

⁶⁷ See *id.* at 266.

⁶⁸ John Ostermiller, Director of the National Coast Guard Museum to be built in Fort Trumbull, addressed the Friends of Fort Trumbull on June 25, 2009. The Museum's objective will be to educate visitors about the extensive contributions the Coast Guard has made to provide security and to save lives. Mr. Ostermiller is responsible for museum programming, internal infrastructure, and fundraising efforts for the construction of the country's newest national museum. Posting of Friends of Fort Trumbull to The New London Day Event Calendar, <http://thetimesgroup.com/events/eventpost.aspx?PostID=21723> (May 11, 2009, 12:16 EST).

The Master Plan (completed by White Oak Associates) is at the Department of Homeland Security, for submission to Congress this winter. Congress' [sic] receipt of this report allows the Coast Guard to budget for the operation of the museum when completed (\$3M+/year), and provide such assurance to USCG Museum Association. Fund raising will be on hold until this is done.

E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (Oct. 13, 2009) (on file with author).

⁶⁹ Interview with John Brooks, Executive Dir., New London Dev. Corp. (June 1, 2009).

years to work its way through (the court system), then a substantial portion of this project would be constructed by now,” said Brooks. “But we are victims of the economic cycle, and there is nothing we can do about that.”⁷⁰

Standing on the site where Kelo’s Little Pink House once stood, on a bright blue day in June 2009, it is easy to imagine that happening, once the economy recovers and hotel financing revives. Meanwhile, environmentalists will be cheered to know that the grasslands rising on Fort Trumbull’s vacant sites offer a much needed habitat to species of nesting birds and other wildlife that development has driven out of most parts of New London.⁷¹

New London officials, residents, and well wishers were disappointed to learn in November 2009, that Pfizer, having merged with Wyeth Pharmaceuticals, was closing six of its eleven major research and development sites worldwide, including the one in Fort Trumbull. Most of the 1400 employees now working in New London will be transferred to the company’s facility in Groton, Connecticut. The move will take place over the next two years, as the company searches for a buyer or tenant for its New London space.⁷² New London’s city manager observed at a council meeting recently that “whatever business replaces Pfizer would be an asset.”⁷³ The space was developed entirely with offices, no lab space, and this makes it easier to rent or sell. It could be of interest to biotech firms.⁷⁴ City officials are hoping Pfizer will not sell out to a school, hospital, or other tax exempt entity.⁷⁵

The strategy of a redevelopment agency acquiring and clearing large areas for development before committing a developer to the re-use of the site is characteristic of projects funded from grants by higher levels of government. As Professor William Fischel pointed out, cities have little financial incentive to make a cost-benefit calculation that takes into account the timing of future development, when they are not providing the

⁷⁰ Katie Nelson, *Conn. Land Taken from Homeowners Still Undeveloped*, ASSOCIATED PRESS, Sept. 25, 2009.

⁷¹ Judy Benson, *Fort Trumbull Neighborhood Is for the Birds*, NEW LONDON DAY, July 7, 2009.

⁷² Adam Bowles, *Pfizer To Close New London R&D Facility: 1,400 Jobs Will Be Relocated to Company’s Groton Campus*, NORWICH BULL., Oct. 9, 2009, <http://www.norwichbulletin.com/news/business/x809126968/Pfizer-to-close-New-London-R-D-facility>.

⁷³ Kathleen Edgecomb, *NL Council Wants To Be “Part of the Discussions” on Pfizer Site*, THE DAY.COM, Nov. 17, 2009, <http://www.theday.com/article/20091117/NWS01/311179930/1070/FRONTPAGE> (referring to a statement by Martin H. Berliner, New London City Manager).

⁷⁴ Paul Pescatello, President of CURE, the chief advocate for the pharmaceutical and biotech industry in Connecticut, “envision[s] a joint venture of several biotech firms, perhaps some from Boston or elsewhere in the Northeast and some from Connecticut, for example.” Eric Gershon, *Pfizer’s New London Complex May Be a Hard Sell*, HARTFORD COURANT, Oct. 11, 2009, <http://www.courant.com/business/hc-pfizerbuilding.artnov11.0.378655.story>.

⁷⁵ Edgecomb, *supra* note 73. The site is not zoned for school or hospital use. *Id.*

funds to buy the land.⁷⁶ Local governments eagerly accept grants from federal and state governments, not knowing for sure when those governments will shut the cash flow spigot. Without state funds, NLDC would not have had any means of financing the Fort Trumbull revival effort. By way of contrast, redevelopment agencies relying mainly or solely on locally raised revenues, usually tax increment financing, generally refrain from acquiring and demolishing properties on the tax rolls until a replacement user (and taxpayer) is firmly in hand.⁷⁷

VIII. THE DEBATE ABOUT THE PROPER PLACE OF LOCAL GOVERNMENTS IN LAND DEVELOPMENT

A topic Benedict never reaches, but one that lies just beneath the surface in all of IJ's endeavors, is whether local governments should dictate the parameters of land development within their boundaries. Libertarians tend to believe that local governments should confine their involvement in land development to building roads, schools, and other traditional "public uses," reserve their redevelopment powers—if such powers can be exercised at all—to the elimination of the most deeply blighted properties that cannot be improved any other way, and restrict zoning and other land use controls to reconciling potential incompatibilities among adjoining private property owners.⁷⁸ Libertarians tend to share the late Jane Jacobs's view that "planning a successful downtown redevelopment, or housing and parks and a successful neighborhood, wasn't really possible at all—that cities and city neighborhoods had an organic structure of their own that couldn't be produced at a drafting table."⁷⁹

⁷⁶ William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 943–44.

⁷⁷ George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got To Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 840–41 (2008).

Redevelopment agencies furiously assembled acreage "blind"—without any commitments from developers to buy and build. Cities often discovered painfully, after clearing out all the residents and small businesses that the market had already been putting the land to its "highest and best use," and there were no viable takers for it. . . . Today, redevelopment is funded mainly by state grants and locally raised tax revenues. By the time the federal cash cow ran dry, local governments came to appreciate the virtues of redevelopment agencies striking a deal with a developer or receiving sufficient expressions of interest and preliminary negotiations to attain confidence that the project would be completed on schedule.

Id.; see also Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 17 (2007).

⁷⁸ See ROBERT BRUEGMANN, *SPRAWL, A COMPACT HISTORY* 156–58 (2005); Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1413 (2006); see generally Steven Greenhut, *New Urbanism: Same Old Social Engineering*, FREEMAN, Apr. 2006, available at http://www.heartland.org/custom/semod_policybot.pdf/20078.pdf (arguing that the land use movement fits into a libertarian land use scheme because libertarians desire the elimination of all land use regulations).

⁷⁹ ANTHONY FLINT, *WRESTLING WITH MOSES* 124 (2009).

The contrary view starts with the premise that an essential role of effective government is to supply the framework within which urban development takes place, a robust infrastructure of transportation networks, schools, libraries, parks, bridges, and public buildings—even ardent libertarians grudgingly concede the occasional utility of eminent domain to acquire land for these purposes.⁸⁰ Making the most efficient use of public infrastructure investments and implementing broad environmental and land use policies argues against leaving final decisions about the optimal use of land solely to private developers. A city's development, appearance, and destiny should not rest entirely on the vagaries of fluctuating real estate markets, transitory private developers and individual property owners more focused on their short term interests than the city's long term viability, sustainability, and appeal.⁸¹ Governments need to rationalize the connections between the location and density of land uses within a community and the placement and quality of infrastructure.⁸² Lately, public land use policies have favored smart growth, mixed land uses, increased densities, and transit-oriented redevelopment.⁸³

IX. IJ'S REPRESENTATION OF KELO AND OTHERS

IJ represented only seven of the ninety persons who had held title to Fort Trumbull's privately owned properties.⁸⁴ Most of the other owners negotiated a price based on two or more independent certified real estate appraisals.⁸⁵

In 1998, NLDC offered Kelo \$78,000—a \$22,000 profit.⁸⁶ “Susette balked. ‘Look at this view,’ she said, pointing toward the Thames River. ‘How many people with a \$70,000 house have a view like this? If I leave

⁸⁰ See Richard Epstein, *Not So Private Takings: A Response to Abraham Bell's Private Takings*, LEGAL WORKSHOP, Mar. 19, 2009, <http://legalworkshop.org/2009/03/19/not-so-private-takings-a-response-to-bell>.

⁸¹ See Richard E. Foglesong, *Planning the Capitalist City*, in READINGS IN PLANNING THEORY 102, 103 (Scott Campbell & Susan S. Fainstein eds., 2d ed. 2003) (discussing the Marxist view of urban planning).

⁸² See James Kushner, *Growth for the Twenty-First Century—Tales from Bavaria and the Vienna Woods: Comparative Images of Planning in Munich, Salzburg, Vienna, and the United States*, 29 URB. LAW. 911, 947–48 (1997) (offering a comparison of land use policies between Europe and the United States).

⁸³ INT'L ECON. DEV. COUNCIL, ECONOMIC DEVELOPMENT AND SMART GROWTH 5 (Alex Iams & Pearl Kaplan eds., 2006), available at http://www.iedonline.org/Downloads/Smart_Growth.pdf.

⁸⁴ Of the six other owners, one had filed bankruptcy and had a limited financial stake in the outcome, three were not residents of Fort Trumbull when NLDC initiated its acquisition effort, title to one property was held by a construction company, and two separate landlords held title to a majority of the properties at stake. Interview with John Brooks, *supra* note 69; see also *Kelo II*, 843 A.2d 500, 508 n.2 (2004); BENEDICT, *supra* note 1, at 201–03; Brooks & Busch, *supra* note 51, at 20–21.

⁸⁵ “The vast majority of the properties were acquired in a friendly way.” Brooks, July 21 E-mail, *supra* note 37.

⁸⁶ BENEDICT, *supra* note 1, at 67.

here, where can I go and get the same thing?""⁸⁷

At times, Kelo seems to have been motivated solely by the goal of obtaining sufficient compensation to buy a similar house with a water view. Bethé Dufresne, a writer for *The New London Day*, claims that she sat at Susette Kelo's kitchen table only days before IJ agreed to represent the holdouts, while Kelo flipped through real estate ads. Dufresne reports that Kelo seemed willing to consider "a small house in Niantic, with a water view, for a little more than \$200,000." But Susette was distressed because "NLDC claimed it couldn't pay enough to replace what she felt she'd be losing."⁸⁸

If Kelo's goal was to squeeze NLDC for the highest possible price, IJ would not have seen itself as the right lawyers for her. IJ's stated goal is not to obtain the most money for their clients from the condemnor, but to resist the condemnation and enable their clients to reclaim title to their homes and rental properties.

X. HOW IJ'S APPROACH DIFFERS FROM THAT OF MOST EMINENT DOMAIN LAWYERS

In most cities, including New London, attorneys who specialize exclusively in eminent domain stand ready to represent property owners about to be shortchanged by a government's last best offer. These attorneys work on contingent fees, customarily pocketing between twenty and fifty percent of the difference between the agency's highest offer and the sum eventually paid, including statutory relocation benefits.⁸⁹ Of course, eminent domain attorneys working on contingent fees will not take a case unless, based on their own appraisers' estimates, they believe the owner's just claim exceeds the agency's best offer by a large enough sum to make the case worthwhile for them.

The condemnation bar serves well the many realty and business owners who have no problem with their properties being acquired by eminent domain as long as the price is right. Governments are all cash buyers; their purchases are not contingent on mortgage financing.⁹⁰ Also, sellers whose property is taken in eminent domain, real or threatened, can reinvest the sales proceeds in similar property free of federal capital gains

⁸⁷ *Id.* at 131.

⁸⁸ Bethé Dufresne, *Standoff at Fort Still Leaves Foes Room To Wiggle*, NEW LONDON DAY, May 17, 2002.

⁸⁹ See PATRICK J. ROHAN & MELVIN A. RESKIN, 8A NICHOLS ON EMINENT DOMAIN § 15.06[3] (3d ed. 2009); see also *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 892 (1st Cir. 1985); Gideon Kanner, *Recent Developments in Eminent Domain*, ALI-ABA Course of Study, Jan. 4, 2001, WL SF54 ALI-ABA 1, at *22 (Westlaw) (2001).

⁹⁰ Government entities must deposit with the court the estimated value of property it purports to take through eminent domain. See 3 FERDINAND S. TINIO, NICHOLS CYCLOPEDIA OF FEDERAL PROCEDURE FORMS § 109.11 (2004).

tax.⁹¹ Homeowners, too, sometimes welcome governments as buyers. Some were going to move sooner or later in any event (approximately twelve percent of the population moved between 2006 and 2007;⁹² U.S. homeowners' median stay in the same residence is 8.2 years⁹³).

Though Benedict writes that the Fort Trumbull property owners had difficulty finding counsel to represent them,⁹⁴ he does not mention the cases of the three Fort Trumbull owners who sued NLDC for more money. Two of them struck out; the court found that NLDC had proffered adequate compensation. The third challenger won an increased award based on a legitimate element of value NLDC's appraisers had overlooked.⁹⁵

Property owners seldom have difficulty finding condemnation counsel to contest "low ball" offers. But eminent domain counsel duck and cover when approached by property owners bearing offers that match or beat prevailing norms for "just compensation." IJ's agenda, however, is not about securing "just compensation" for their clients. IJ lawyers work tirelessly to keep their clients in their homes and small businesses. Unless they drop their cases mid-stream, IJ clients pay no legal fees. For IJ attorney Scott Bullock, the "'come to Jesus' moment" arrives when the condemner starts waving more money in front of his clients.⁹⁶ He demands "an ironclad promise" they will not capitulate.⁹⁷

Benedict reports how IJ founder and president, Chip Mellor, envisioned the organization's mission:

The concept behind the Institute for Justice was the notion of entrepreneurial lawyering at no charge to the clients. There were no contingency-fee cases either. All of the institute's funding came from private donors. To Mellor, litigation was always about much more than winning a single case. In his world, cases had to be platforms for a cause that went beyond any one individual.⁹⁸

"'We don't negotiate property sales for our clients,' Bullock explained. 'That's just not what we do. We fight to protect people's property.'"⁹⁹ To advance the cause by assisting property owners to resist eminent domain abuse and raise funds from the general public for the effort, IJ formed the

⁹¹ See 26 U.S.C. § 1033 (2006).

⁹² Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1124 (2009) (citation omitted).

⁹³ *Id.* at 1125.

⁹⁴ See BENEDICT, *supra* note 1, at 153 (explaining that many lawyers and law firms in New London did not want to sue the city on behalf of the Coalition to Save Fort Trumbull Neighborhood).

⁹⁵ Brooks, July 21 E-mail, *supra* note 37.

⁹⁶ BENEDICT, *supra* note 1, at 169.

⁹⁷ *Id.*

⁹⁸ *Id.* at 199.

⁹⁹ *Id.* at 169.

“Castle Coalition” in 2002, a “nationwide grassroots property rights activism project.”¹⁰⁰

In situations where condemners forfeit the right to use eminent domain due to their disregard of proper procedures, such as acting beyond their statutory authority or taking property unconstitutionally, the contingency fee lawyer sees these as opportunities for clients to negotiate much higher settlement prices than the customary rules of “just compensation” would normally allow. After all, such clients are freed from having to sell at all. But owners not looking to sell regardless of price, owners who are determined to retain title by overthrowing condemnations predicated on faulty legal underpinnings, must be prepared to shoulder personally the potentially enervating legal costs of suing a public entity. They only save themselves from liability for big legal bills if a public interest firm like IJ comes to their rescue.¹⁰¹

Under Connecticut law, these holdouts might have been summarily evicted once NLDC started the process by filing with the clerk of the Connecticut Superior Court a statement of compensation advising the owners what NLDC believed their properties to be worth, and depositing that sum with the court.¹⁰² Shortly thereafter, by operation of law, legal title shifts to the condemner unless the property owner goes to court to halt and unravel the process. That is what IJ lawyers Scott Bullock and Dana Berliner had to do. They managed adroitly to keep their clients in place during the ensuing five years of litigation.

XI. THE DECISION TO APPEAL THE TRIAL COURT DECISION

Kelo had a chance to keep her house following the state trial court’s decision. The trial judge had ruled for the City of New London on all of the constitutional issues but found that NLDC’s vague and contradictory plans for Parcel 4A cast doubt on whether these properties were reasonably necessary for NLDC to acquire. “[T]he city had failed to specify what it

¹⁰⁰ Castle Coalition: Citizens Fighting Eminent Domain Abuse, <http://www.castlecoalition.org/> (follow “About the Castle Coalition” hyperlink) (last visited Jan. 31, 2010); see also Steven Anderson, *How the Castle Coalition Helped Save Chicago Businesses from Eminent Domain Abuse*, LIBERTY & L., Feb. 2008, at 4, available at http://www.instituteforjustice.org/images/pdf_folder/liberty/LL_2-08.pdf.

¹⁰¹ Noreen E. Johnson, *Blight and Its Discontents: Awarding Attorney’s Fees to Property Owners in Redevelopment Actions*, 93 MINN. L. REV. 741, 742–43 (2008); see also Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887–88 (2007) (discussing the high cost of hiring a fee-based attorney to fight low appraisals).

¹⁰² See 3 Conn. Prac. Civil Practice Forms, Form 404.1 authors’ cmt. (4th ed. 2004) (describing the procedural requirements of the statement of compensation). Unless the property owner files suit challenging the taking or the preferred compensation, the condemner has the right to immediate possession. See *Redevelopment Agency of Norwalk v. Norwalk Aluminum Foundry Corp.*, 233 A.2d 1, 5 (Conn. 1967) (stating that the condemner has the right to deduct from the price paid the value of occupancy from the date the condemner first had the right to immediate possession, following its service of a notice to quit upon the condemnee).

planned to do with all the land beneath Susette's house and all the other houses on her block."¹⁰³ The city's plans for Parcel 3 were clear enough.¹⁰⁴ But NLDC had designated Parcel 4A for different uses at different points in time—state park support, marina support, parking,¹⁰⁵ and the U.S. Coast Guard Museum—though a Coast Guard admiral had written a letter to Kelo stating that the Coast Guard had no interest in placing its museum on that particular parcel.¹⁰⁶

The trial court based its decision on lack of reasonable necessity,¹⁰⁷ a challengeable result since most courts leave decisions concerning public necessity for a taking to legislators—which properties to acquire, for what purposes, whether the property taken is actually needed for the project, and whether the project is likely to succeed.¹⁰⁸

Still, if no one appealed the decision, Susette Kelo, Billy Von Winkle, and Matthew Dery could have retained title to their properties. This could have been deeply disappointing to Billy Von Winkle, a real estate entrepreneur who was eager to cash out—at the right price.¹⁰⁹ Appealing the decision would also benefit IJ's cause by keeping the case in the news. Matthew Dery's situation was more complicated. His parents owned four units, one occupied by Matt's family, another by his parents, and three rental units—a duplex and a single family rental.¹¹⁰ Matt's mother, Wilhelmina, resided in the very same house in which she had been born, and where she would pass away at age eighty-eight in 2006.¹¹¹ By not appealing, he could be assured of his parents' undisturbed possession for life. But renting might become a challenge once NLDC cleared Parcel 4A of all other structures except those owned by the three holdouts. For Kelo, this would be her last chance to hang on to the Little Pink House, and she let it go.

¹⁰³ BENEDICT, *supra* note 1, at 268.

¹⁰⁴ *See id.* at 265 (stating that Parcel 3 was to be used as office space and parking).

¹⁰⁵ The court in *Kelo I* noted:

At one point it says: "A portion of parcel 4A will be redeveloped for uses that support the state park such as parking or for uses such as retail that will serve park visitors and members of the community." At another point it says: "Parcel 4A is intended to accommodate the development of support facilities for a marina, or a marina training facility, to be developed south on parcel 4B and the Fort Trumbull State Park to the east."

Kelo I, No. 557299, 2002 Conn. Super. LEXIS 789, at *224 (Conn. Super. Ct. Mar. 13, 2002).

¹⁰⁶ BENEDICT, *supra* note 1, at 187.

¹⁰⁷ *Kelo I*, 2002 Conn. Super. LEXIS 789, at *265.

¹⁰⁸ *Id.* at *246–48.

¹⁰⁹ E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (June 10, 2009, 15:53 PST) (on file with author) [hereinafter Brooks, June 10 E-mail].

¹¹⁰ E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (Aug. 6, 2009, 12:17 PST) (on file with author) [hereinafter Brooks, Aug. 6 E-mail].

¹¹¹ Elaine Stoll, *Wilhelmina Dery, Who Fought Eminent Domain, Dies in Her Fort Trumbull Home*, NEW LONDON DAY, Mar. 14, 2006, available at <http://emdo.blogspot.com/2006/04/wilhelmina-dery-who-fought-eminant.html>.

After the trial court judgment was handed down, the NLDC executive committee, acting on behalf of the board, voted to

refrain from instituting appeal proceedings in the IJ case and accept the judgment as rendered in the Superior Court, with the caveat that the NLDC will defend its position in appeals initiated by other parties and reserve for future consideration the right to file appropriate cross appeals in such event. Further, that the NLDC calls on all other parties to also accept the decision without appeal.¹¹²

John Brooks observes that the NLDC Board was prepared to abandon the use of eminent domain and work around the six parcels and nine buildings on Parcel 4A that the plaintiffs owned.¹¹³ In the end, the Parcel 4A plaintiffs took their chances and agreed to join the appeal, along with the Parcel 3 plaintiffs, out of a feeling of solidarity, and greatly influenced by Bullock's conviction that NLDC would try to find some way to condemn the properties later.¹¹⁴

The plaintiffs' mistrust of NLDC was heightened by a statement that its then-Executive Director, Dave Goebel, made to a local newspaper columnist that, if the corporation could not acquire Parcel 4A voluntarily, it might use eminent domain in the future.¹¹⁵ Bullock feared that even if NLDC did not change its mind and decided to appeal, it might come back with "another developer" to condemn the properties on that parcel.¹¹⁶ He used this rationale to advise the plaintiffs to reject NLDC's proposal.¹¹⁷ But NLDC would have needed city permission to make this switch and to do it by December 31, 2002, unless the City of New London extended that deadline.¹¹⁸

¹¹² E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (June 3, 2009, 08:12 PST) (on file with author) [hereinafter Brooks, June 3 E-mail].

¹¹³ See Brooks, June 10 E-mail, *supra* note 109 ("The Coast Guard began to waver on the acceptance of a site possibly made toxic by eminent domain, and it is highly unlikely that they would have concurred with a 'second bite at the apple' prior to the end of the year to secure Parcel 4A with eminent domain. At least one letter mentioned that they hoped that a site would be assembled 'without the use of eminent domain.'").

¹¹⁴ See BENEDICT, *supra* note 1, at 272.

¹¹⁵ *Id.*

¹¹⁶ Brooks, June 3 E-mail, *supra* note 112.

¹¹⁷ BENEDICT, *supra* note 1, at 272.

¹¹⁸ According to Brooks:

The fact of the matter was that eminent domain expired on December [3]1[,] 2002. Unless there was a development agreement signed with the Coast Guard Museum Association prior to that date, there would have been no development meeting Judge Corradino's test. There was no chance of the CGMA being in a position to sign by then, since they needed to raise money to develop much of the information required. No other option was even close, since that was still [the] intended site for [the] USCG Museum. Once IJ appealed, the 4A litigants ("winners") refused to consider voluntary sale to a third party (for the purpose of assemblage for [the] USCG Museum), and the wheels were in motion leading to [the] U.S. Supreme Court.

Measured from the trial court decision on March 13, 2002,¹¹⁹ NLDC would have had nine months left before its right to use the power of eminent domain expired.¹²⁰ During this time, NLDC would have had to identify a convincing use for taking Parcel 4A, and yet it had no potential developer in sight for the parcel. However unlikely it was that NLDC could push through the amendment process in nine months, the text of the enabling statute left one loophole. The City Council could extend the condemnation deadline if it were prepared to incur the bad press this would entail.¹²¹

XII. THE DOCTRINE OF NECESSITY

In appealing the trial court decision, Bullock and Berliner knew they were taking a big chance because the trial court had framed the ruling in their favor on Parcel 4A on two highly questionable legal assumptions. One was the burden of proof. Under Connecticut law, the property owner has the burden of proving that the taking was in error.¹²² The trial court had clearly reversed that presumption and placed the burden on NLDC. Further, courts rarely second-guess legislative determinations that a particular property is necessary for a public purpose.¹²³ Berliner had reminded Bullock of this when he decided to include a count in his complaint based on the fact that NLDC did not need the properties on Parcel 4A to fulfill its municipal development plan. He had added this count because, “[u]nlike most of the other parcels within the ninety-acre development area, Parcel 4A had not been designated for any specific construction.”¹²⁴ Predictably, the Connecticut Supreme Court reversed the trial court’s decision regarding Parcel 4A, rejecting the trial court’s opinion on both of these points.¹²⁵

Eventually, IJ won a partial trial court victory for some of its clients. Had no one appealed the judgment, Kelo and some of the other plaintiffs could have reclaimed title and stayed put. Instead, IJ appealed and lost, 4-3 in the Connecticut Supreme Court and 5-4 in the United States

Brooks, June 3 E-mail, *supra* note 112.

¹¹⁹ *Kelo I*, No. 557299, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002).

¹²⁰ See Brooks, June 3 E-mail, *supra* note 112 (noting that “eminent domain expired on December [3]1, 2002”).

¹²¹ See Brooks, June 10 E-mail, *supra* note 109.

¹²² *Kelo II*, 843 A.2d 500, 572 (Conn. 2004).

¹²³ See *Kelo I*, No. 557299, 2002 Conn. Super. LEXIS 789, at *197–98 (“Our decisions establish that a court will not disturb a determination of necessity, [in] the absence of fraud, bad faith or gross abuse of discretion; the determination of the necessity of taking will be upheld if there is reasonable ground to support it.”).

¹²⁴ BENEDICT, *supra* note 1, at 207.

¹²⁵ *Kelo II*, 843 A.2d at 569, 572–73; see also Robert C. Bird & Lynda J. Oswald, *Necessity as a Check on State Eminent Domain Power*, 12 U. PA. J. CONST. L. (forthcoming 2010) (making a spirited case for courts to grant limited review of whether particular takings are necessary).

Supreme Court.

XIII. THE DISPUTE AMONG NEW LONDON'S ATTORNEYS OVER HOW BEST TO FRAME THEIR CASE BEFORE THE U.S. SUPREME COURT

For Londregan, the trial court's opinion was particularly distressing. He believed that a project met the constitutional standard of "public use" as long as it conferred substantial public benefits.¹²⁶ Meticulously, Londregan had established at trial the sizable "public goods" that NLDC's plan had conferred.¹²⁷ At trial, Londregan had carefully proven, lot by lot, that each of the buildings on Parcel 4A stood in the way of widening the street to the nationally acceptable standard right-of-way of fifty feet¹²⁸ and making sure all buildings were sufficiently set back from the corners of their lots to provide a safe line-of-sight for passing vehicles.¹²⁹ Surely roads and sidewalks counted as quintessential public uses. Even IJ conceded as much in its public relations statements concerning eminent domain.¹³⁰

The attorneys who advised New London on condemnation matters, Wes Horton and Ed O'Connell, questioned Londregan's analysis.¹³¹ Sure, NLDC's city-approved plan for Fort Trumbull had substantial public benefits and public uses. But the condemnations of Parcel 4A were not initiated under provisions of the Connecticut statutes dealing with highways, parks, or other widely acknowledged public uses.¹³² Instead, eminent domain was initiated under Chapter 132 concerning economic

¹²⁶ See BENEDICT, *supra* note 1, at 249 ("[L]ondregan still felt he would prevail. The fact that the city's municipal-development plan included new utilities, roads, and infrastructure to the Fort Trumbull area—all public benefits—seemed to bode well for the city.").

¹²⁷ See *id.* at 254 ("[At trial], Londregan pointed out that the NLDC had spent \$73 million in state money to upgrade the roads, sewers, streetlights, and underground utilities in and around the Fort Trumbull area—all of which resulted in public benefits.").

¹²⁸ See DAVID E. JOHNSON, RESIDENTIAL LAND DEVELOPMENT PRACTICES 90 (3d ed. 2008) ("Most municipalities use a 50-foot right-of-way for local residential streets. The right-of-way changes as the number of lots or average daily traffic (ADT) changes for a road segment."). The "right of way" is not just the roadway, but "includes curbs, grass 'snow shelf,' sidewalks, street lighting [sic] etc." Brooks, Aug. 6 E-mail, *supra* note 110. The standard is twenty-eight feet for a street with no parking "(curb to curb)," and "34 [feet] if marked for parking on one side of the street." *Id.*

¹²⁹ See JOHNSON, *supra* note 128, at 90. "The real issue for 4A was that they were located on key corners (and sightlines at corners are a real safety issue)." E-mail from John Brooks, Executive Dir., New London Dev. Corp., to George Lefcoe (Apr. 21, 2009) (on file with author).

¹³⁰ See Dana Berliner, Attorney, Inst. for Justice, Unequal Protection—The Injustice of Using Eminent Domain on Behalf of Private Business, Address at the Fourth Annual New York Conference on Private Property Rights (1999), available at <http://prfamerica.org/speeches/4th/UnequalProtection.html> (observing that the government can use eminent domain if it plans on owning the property it is taking, such as a road).

¹³¹ Interview with Edward B. O'Connell, Attorney, in New London, Conn. (June 1, 2009).

¹³² See, e.g., CONN. GEN. STAT. § 13a-73(b) (2009) (authorizing the taking of land for state highway modification purposes or for the creation of a highway maintenance storage area); *Id.* § 48-7 (permitting the taking of land within municipal or district limits for a public park or common area in the event that the owner of the desired tract does not consent to the taking).

development.¹³³ Roads were being widened, not necessarily or exclusively for park or marina purposes, but rather to support future economic development on Parcels 3 and 4A. Hence, NLDC needed the courts to vindicate the state statute authorizing condemnation to advance economic development.

If the attorneys for NLDC contended that an economic development project qualified as a “public use” when private benefits were incidental to benefits accruing to the general public, this could arouse the Justices to interrogate counsel on where to “draw a boundary on how far a city could go to take people’s homes or businesses in the name of economic development.”¹³⁴ New London’s appellate counsel, Wes Horton, dismissed this approach because it would invite questions from the Justices that could easily gobble up the few minutes the Supreme Court allows counsel for oral argument.¹³⁵ Better to take the controversial tack that, in the realm of economic development, any public good counted as a public use, including increasing the property-tax base, regardless of whether the project also benefited private individuals and firms. In oral argument, New London’s counsel would concede—to Justice O’Connor’s evident dismay, and Bullock’s great delight—that a city could replace a Motel 6 with a Ritz Carlton just for the increased property taxes.¹³⁶ New London’s counsel lost Justice O’Connor’s vote on that one, but carried the day nonetheless.¹³⁷

XIV. THE U.S. SUPREME COURT MAJORITY OPINION

Benedict barely mentions the sweeping rationale of the majority opinion. The majority firmly rejected IJ’s attempt to differentiate economic development takings from the Supreme Court’s approval half a century earlier in *Berman v. Parker* of the use of eminent domain to eradicate blight through urban redevelopment.¹³⁸ Had the Court ruled otherwise, there would have been no one to blame for the outcome but ex-Governor Rowland, who started the events in motion by deciding to proceed under Connecticut’s economic development laws instead of its urban redevelopment statutes. Whether the City of New London could have established the requisite findings under Connecticut’s redevelopment

¹³³ *Kelo I*, No. 557299, 2002 Conn. Super. LEXIS 789, at *287 (Conn. Super. Ct. Mar. 13, 2002).

¹³⁴ BENEDICT, *supra* note 1, at 312.

¹³⁵ EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT, *supra* note 64, at 307–08.

¹³⁶ *Id.* at 302, 308.

¹³⁷ *See id.* at 291, 308 (stating Bullock’s observation that the Supreme Court in *Kelo* upheld New London’s use of eminent domain for private economic development, but that Horton’s response to the Motel 6 question contributed to Justice O’Connor’s dissent). Wes Horton himself is not sure whether the Court’s opinion in *Kelo* would support the government taking one owner’s property to transfer to another private owner just for increased property-tax revenues. *Id.* at 297.

¹³⁸ *Berman v. Parker*, 348 U.S. 26, 35 (1954); *see generally* Amy Lavine, Urban Renewal and the Story of *Berman v. Parker* (Nov. 22, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511343.

laws, we will never know for sure. But the majority opinion declines to endow the distinction with constitutional significance:

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.¹³⁹

XV. LITIGATING IN THE COURT OF PUBLIC OPINION

Though the IJ lawyers were rebuffed in the Connecticut and U.S. Supreme Courts, they decisively crushed NLDC in the court of public opinion. Public disapproval of the *Kelo* ruling ran eighty to ninety percent.¹⁴⁰ Media relations are very important to IJ: its business model depends on public awareness of its accomplishments to draw donors to support its mission.

One of the first people the IJ founders hired was a full time public relations expert, John E. Kramer.¹⁴¹ Kramer knows how IJ works, has spent years nurturing his list of media contacts, and possesses an impressive talent for telling the IJ story in a crisp and convincing way.¹⁴²

IJ lawyers routinely and enthusiastically contribute to the public relations effort. So, for instance, immediately upon agreeing to represent Kelo and her neighbors, Bullock and Berliner formulated the following game plan: (1) “Draft the legal complaint”; (2) “Develop a background paper on the case, discussing the case history and the plaintiffs’ background”; (3) “Generate a media advisory”; (4) “Produce a news

¹³⁹ *Kelo III*, 545 U.S. 469, 483–84 (2005).

¹⁴⁰ Janice Nadler et al., *Government Takings of Private Property: Kelo and the Perfect Storm* 16 (Northwestern Sch. of Law, Pub. Law & Legal Theory Series, Working Paper No. 07-05, 2007), available at <http://ssrn.com/abstract=962170>.

¹⁴¹ BENEDICT, *supra* note 1, at 209–10.

¹⁴² See, e.g., John E. Kramer, *Sending in the IJ Cavalry*, LIBERTY & L., Sept. 2001, available at http://www.ij.org/index.php?option=com_content&task=view&id=1737&Itemid=245 (demonstrating Kramer’s skill in story-telling in an article by Kramer about the *Kelo* case).

release for distribution on the day the lawsuit would be filed"; and (5) "Plan an event in New London to accompany the filing."¹⁴³

IJ won the media contest by default. Tom Londregan, New London's long time city attorney (who had never heard of IJ before this case arose) resolved to fight the case only in court, not on the courthouse steps. "I'm not used to competing in the media," Londregan said later. "I'm just used to going to court and arguing a case. We are such novices in the media-relations business that we never got our story out to the public."¹⁴⁴

Londregan concedes this was a big mistake. Too late, he learned that a victory in court can prove worthless when offset by a decisive defeat in the court of public opinion.¹⁴⁵ The public outcry led to changes in eminent domain laws across the country.¹⁴⁶ For the litigants, the consequences were up close and personal. After the City finally prevailed in court and established its right to take the IJ plaintiffs' properties by eminent domain, the Mayor and City Council were poised to press their victory and take possession of the holdouts' properties, forcibly if necessary. But the Governor of Connecticut intervened to avoid a media free-for-all eviction show down. In a series of vigorously negotiated settlements, the Governor agreed to pay the holdouts far more money than most other Fort Trumbull property owners had received, on the understanding they would move out peaceably.¹⁴⁷ Earlier, the U.S. Coast Guard walked away from Parcel 4A (the site of the Kelo house) as the location for a U.S. Coast Guard Museum to escape any political fall-out from the nationwide eminent domain protests.¹⁴⁸ The well-publicized eminent domain controversy may have stigmatized Parcel 4A for other potential developers as well.¹⁴⁹

This experience has turned Londregan around on the topic of litigation public relations. Had he to do it again, he says the first person he would add to his firm's roster would be "not another appellate lawyer, not a

¹⁴³ BENEDICT, *supra* note 1, at 205–06.

¹⁴⁴ *Id.* at 271.

¹⁴⁵ HAGGERTY, *supra* note 31, at xviii.

¹⁴⁶ See Douglas W. Kmiec, *Hitting Home—The Supreme Court Earns Public Notice Opining on Public Use*, 9 U. PA. J. CONST. L. 501, 501 (2007); George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 48 (2008); Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561, 564 (2008); Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 104–05 (2005); John G. Sprankling, *Introduction: The Impact of Kelo v. New London on Eminent Domain*, 38 MCGEORGE L. REV. 369, 370 (2007); William Woodyard & Glenn Boggs, *Public Outcry: Kelo v. New London—A Proposed Solution*, 39 ENVTL. L. 431, 442 (2009); Kristyna C. Ryan, *Private Property, Public Benefit: Economic Redevelopment and the Power of Eminent Domain*, 19 CBA REC. 50, 50 (2005).

¹⁴⁷ See *infra* note 165 and accompanying text (listing the properties involved, the NLDC appraised value in 2000, and the price paid in 2006, adjusted for inflation).

¹⁴⁸ BENEDICT, *supra* note 1, at 187, 207.

¹⁴⁹ See Brooks & Busch, *supra* note 51, at 23 (noting the effect negative media may have had on the City of New London).

paralegal, not an associate, but a media relations specialist.”¹⁵⁰

Finding a qualified specialist in litigation public relations is seldom easy. Good sales people need to understand what they are selling and few PR specialists know much about law or legal proceedings. The revenue tends to ebb and flow, and therefore can be difficult to predict for budgeting purposes at a large PR firm. “[T]he senior-level nature of the work, with its complexity, doesn’t fit well with most PR firms, where the senior executives sell the business and junior people actually do the work.”¹⁵¹

XVI. DEFINING “JUST COMPENSATION”:

WHY COURTS TEND TO REJECT REPLACEMENT VALUE AS THE NORM

Quite often, a home is worth more to its owner than the price the home would bring in an arm’s length sale. That may have been true of Kelo and her Little Pink House.¹⁵² This premium is sometimes called “consumer surplus.”¹⁵³ Consumer surplus is one of the many types of losses courts have excluded from the constitutional requirement that governments pay “just compensation” for takings.¹⁵⁴ The Fifth Amendment’s cryptic requirement of “just compensation” prescribes no standard for how to measure value. Courts have equated “just compensation” to the price a willing seller would pay a willing buyer neither under duress to sell nor to buy, and must often choose between the parties’ rival appraisals.¹⁵⁵ “Fair market value” is not the only conceivable standard of “just compensation.”

¹⁵⁰ Interview with Tom Londregan, New London City Attorney, in New London, Conn. (June 1, 2009) (on file with author).

¹⁵¹ E-mail from Jim Haggerty, CEO, PR Consulting Group, to George Lefcoe (July 23, 2009, 15:05 EST) (on file with author).

¹⁵² See BENEDICT, *supra* note 1, at 89 (“Her house represented her only possession. More than that, it was a refuge, the place she went to in hope of becoming the woman she had always put off being while raising five sons. She had remodeled the house to reflect her personality and tastes.”).

¹⁵³ “Consumer surplus is a measure of the welfare that people gain from the consumption of goods and services, or a measure of the benefits they derive from the exchange of goods.” Geoff Riley, AS Markets and Market Systems, Consumer Surplus, <http://tutor2u.net/economics/revision-notes/as-markets-consumer-surplus.html> (last visited Nov. 17, 2009).

¹⁵⁴ See *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15–16 (2005) (statement of Thomas W. Merrill, Professor, Columbia University School of Law) (noting that the current compensation required by the courts is inadequate because it is not full compensation); Bell & Parchomovsky, *Taking Compensation Private*, *supra* note 101, at 885–87; Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 926–28 (2004); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 803–06 (2006); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 960–62 (2004); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 14–16 (2005); Alberto B. Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 298–99 (2006); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 252–54 (2007); Nathan Burdsal, Note, *Just Compensation and the Seller’s Paradox*, 20 BYU J. PUB. L. 79, 94–95 (2005); Amnon Lehari & Amir N. Licht, *Squaring the Eminent Domain Circle: A New Approach to Land Assembly Problems*, LAND LINES, Jan. 2007, at 14, 18–19.

¹⁵⁵ *Olson v. United States*, 292 U.S. 246, 257 (1934).

The U.S. Supreme Court identified a competing norm calling for restoration: “The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”¹⁵⁶ A “restoration measure” recognizes that there are certain economic costs imposed on condemnees excluded from “fair market value.”¹⁵⁷ In practice, the norm of restoration has generally been subordinated to the market value standard.

Courts are sensitive to issues of horizontal equity—the need to treat all property owners alike. For this reason, “just compensation” is not designed to put owners in as good a position as they would have enjoyed had the condemnation not taken place. A standard calling for replacement or restoration almost assuredly would produce differential treatment among owners whose properties were physically comparable, or even identical. One owner may have had the idea of selling anyway and welcomes the government as an all cash buyer. A second owner, a book collector with 4000 volumes at home, not planning to move anytime soon, might nonetheless be willing if someone paid her library moving costs. A third owner may be so infirm that the move could kill her. She flatly refuses to sell at any price. One price does not really fit all, even if a real estate appraiser concluded that each of the three homes had the same value.¹⁵⁸ “Increasingly, legislatures are adjusting their models of compensation to take account of the condemnee’s actual losses. Federal and state governments have authorized compensation for attorneys fees, appraisal costs, moving and relocation, and lost business good will.”¹⁵⁹

XVII. THE FINAL SETTLEMENT WITH THE HOLDOUTS

In the end, after the U.S. Supreme Court decision, the New London Mayor and City Council wanted to evict the holdouts and pay them on the same basis as other Fort Trumbull owners (the mayor received over 4000 e-mail death threats related to the *Kelo* episode).¹⁶⁰ But the State held the compensation purse strings. Benedict reports that Governor Rell did not agree with the Supreme Court majority, and worried how it would look, especially to her staunch Republican base, to be seen as the one responsible for the sheriff forcibly evicting *Kelo* and the other holdouts.¹⁶¹

Bullock skillfully represented the holdouts in a daring “high-stakes

¹⁵⁶ *United States v. Miller*, 317 U.S. 369, 373 (1943); *see also* *United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966).

¹⁵⁷ *Miller*, 317 U.S. at 373–75.

¹⁵⁸ GEORGE LEFCOE, *REAL ESTATE TRANSACTIONS, FINANCE AND DEVELOPMENT* 880, 883 (6th ed. 2009).

¹⁵⁹ *Id.* at 883–85.

¹⁶⁰ Kathleen Edgecomb, *NL Officials Regret Relinquishing Power of Eminent Domain*, NEW LONDON DAY, Mar. 5, 2009.

¹⁶¹ BENEDICT, *supra* note 1, at 331, 363.

game of chicken.”¹⁶² He benefited from the Governor’s fear that Kelo and the others would defy a court order to vacate, and be seen on national television being dragged from their dwellings by law enforcement officials. But Bullock also knew that if he continued haggling to the point of exhausting the Governor’s patience, she might just step aside and let New London officials put a harsh end to the caper.¹⁶³ Under Connecticut law, the property had belonged to the State since 2000, and the owners could be held accountable for enormous back taxes, utilities, occupancy fees, and any rental income they had collected.¹⁶⁴ In the end, the holdouts were relieved on these obligations and received about twice the year 2000 appraised values, plus relocation benefits.¹⁶⁵

Half the money went to two landlords in the group—Rich Beyer and Billy Von Winkle.¹⁶⁶ In 1998, Von Winkle would have taken \$700,000.¹⁶⁷ In 2006, he settled for \$1,800,000.¹⁶⁸

XVIII. KELO’S SETTLEMENT AFTERMATH

Kelo was the last to settle. Benedict reports the reason for her finally agreeing to exit Fort Trumbull: “And for the first time, she got a sense of what it would feel like if she prevailed and got to stay in the fort—awfully lonely. . . . The thought of staying behind in an abandoned neighborhood without her friends felt terribly depressing.”¹⁶⁹ Of course, the area had been fairly desolate for the past four years, ever since NLDC demolished the structures on the sites it had acquired earlier.¹⁷⁰

Kelo agreed in June 2006 to sell for \$442,000 (\$392,000 plus a pay-off of her \$50,000 mortgage); not too bad for a place she had purchased in

¹⁶² *Id.* at 361.

¹⁶³ *Id.* at 360–61.

¹⁶⁴ *Id.* at 359.

¹⁶⁵ Below is the list of the NLDC appraised values for each of the plaintiffs’ properties. It is followed by a list of these sums adjusted for inflation, and, finally, the sums negotiated in 2006. In addition to the following sums, each plaintiff received between \$15,000 and \$30,000 in relocation benefits. This information comes directly from NLDC files. In 2000, the plaintiffs’ properties were appraised as follows: Kelo, \$123,000; the Derys, \$506,000; Von Winkle, \$768,000; Beyer, \$216,000; the Cristofaros, \$150,000; Brelesky (Athenian), \$88,000; and the Gureskys, \$158,000. Using an inflation calculator, the plaintiffs’ appraisals, adjusted for inflation to 2006, were as follows: Kelo, \$144,000; the Derys, \$592,390.24; Von Winkle, \$899,121.95; Beyer, \$368,780.49; the Cristofaros, \$175,609.76; Brelesky (Athenian), \$67,902.44; and the Gureskys, \$184,975.61. In 2006, the plaintiffs settled for the following amounts: Kelo, \$392,000; the Derys, \$950,000; Von Winkle, \$1,800,000; Beyer, \$500,000; the Cristofaros, \$460,000; Brelesky (Athenian), \$174,652; and the Gureskys, \$320,884. Brooks, July 21 E-mail, *supra* note 37.

¹⁶⁶ See BENEDICT, *supra* note 1, at 369 (stating that Beyer agreed to settle for \$500,000 plus costs).

¹⁶⁷ *Id.* at 62.

¹⁶⁸ *Id.* at 369. As far as I have been able to determine, none of the IJ media releases mention this, though Benedict does, and clearly.

¹⁶⁹ *Id.* at 363.

¹⁷⁰ *Id.* at 238.

August 1997 for \$53,500,¹⁷¹ and NLDC had appraised for condemnation at \$123,000 in November 2000.¹⁷² She only sold the lot. Avner Gregory, the same preservationist who had refurbished the house after moving it from its original location to the site where Kelo found it, relocated the house a second time to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as “The Kelo House.”¹⁷³

For \$224,000, Kelo bought a home with a view comparable to the one she had surrendered, located right across the sound from her Little Pink House, near Fort Griswold in Groton.¹⁷⁴ “[S]he knew it was what she wanted: a little house on a little hill overlooking the water.”¹⁷⁵ She put aside the balance of the money for her five sons.¹⁷⁶ One can imagine this as a happy ending to Benedict’s story: the actress playing Kelo casts a knowing smile, content in her new home (median household income, per capita income, and house or condo values are higher in Groton than New London¹⁷⁷).

Despite the windfall, Kelo seems not to be living happily ever after. She proclaimed in the opening line of a speech at a January 27, 2009, event sponsored by the libertarian CATO Institute: “My name is Susette Kelo, and the government stole my home.”¹⁷⁸ This statement may strike one as odd. Thieves do not usually dole out to their victims a bundle of cash exceeding the value of the items stolen.¹⁷⁹ Presumably, Kelo meant to draw attention to her continued belief that NLDC had no lawful right to take her home in the first place.

In 2006, Kelo sent a demonic holiday greeting card depicting a snowy

¹⁷¹ *Id.* at 16, 374.

¹⁷² *Id.* at 191.

¹⁷³ *Id.* at 376; Consent of the Governed, <http://yedies.blogspot.com/2008/06/kelo-house-icon-in-fight-against.html> (June 23, 2008, 11:30 EST).

¹⁷⁴ BENEDICT, *supra* note 1, at 374. In 2006, the median home price in Groton was \$259,450 compared to \$210,000 in New London. Property Taxes in the Region: Who Pays More, Who Pays Less, http://www.nytimes.com/packages/html/nyregion/20061126_TAXES_GRAPHIC/data.html (last visited Oct. 9, 2009).

¹⁷⁵ BENEDICT, *supra* note 1, at 374.

¹⁷⁶ *Id.* at 376.

¹⁷⁷ In 2007, Groton had a median household income of \$48,833; New London, \$40,750. Groton’s estimated median per capita income was \$27,611; New London, \$22,890. Groton’s estimated median house or condo value was \$241,873; New London, \$198,786. City-Data.com, Groton, Connecticut, <http://www.city-data.com/city/Groton-Connecticut.html> (last visited Nov. 13, 2009); City-Data.com, New London, Connecticut, <http://www.city-data.com/city/New-London-Connecticut.html> (last visited Nov. 13, 2009).

¹⁷⁸ YouTube, Susette Kelo Tells Her Story at the Cato Institute, <http://www.youtube.com/watch?v=iFdn6BGV11k> (last visited Jan. 8, 2010).

¹⁷⁹ A recent experiment suggests that most homeowners would accept compensation twice the price of a comparable house, as Kelo did. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 731 (2008).

image of the Little Pink House to about thirty public officials who had opposed her: “Your houses, your homes, your family, your friends. May they live in misery that never ends. I curse you all. May you rot in hell. To each of you I send this spell.”¹⁸⁰ Apparently, Kelo resisted the temptation to send the card to the five U.S. Supreme Court Justices in the majority.¹⁸¹ Was she serious? Was this meant as a harmless, mischievous prank? Did losing her home cause her to become unhinged? Was she wacky all along? Is she trying to reclaim the media spotlight now, regretful that her fifteen minutes of fame is winding down? Kelo told a reporter, “These people can think what they want of me. I will never, ever forget what they did.”¹⁸²

XIX. CONCLUSION: *THE LAST WORD*

Who would have imagined that a book about an eminent domain case could be an irresistible read? Benedict is a great storyteller who takes us behind the scenes in a series of pitched legal battles. He does not allow his II-tilted spin to spoil the fun. *Little Pink House* is chock full of delicious anecdotes, heated encounters, even a touching love story.

Whether a screenplay can be fashioned from these pages is a question best left to my colleagues in film school. In Hollywood, the land where all good dreams are supposed to come true, Kelo does not appear to be living happily ever after. Maybe the final image needs to be of the Little Pink House at its new location, 36 Franklin Street, a fitting reminder of a historic controversy.¹⁸³

¹⁸⁰ PropertyProf Blog, http://lawprofessors.typepad.com/property/2006/12/susette_kelos_h.html (Dec. 20, 2006). The actual text reads:

Here is my house that you did take
From me to you, this spell I make
Your houses, your homes
Your family, your friends
May they live in misery
That never ends.
I curse you all
May you rot in hell
To each of you
I send this spell
For the rest of your lives
I wish you ill
I send this now
By the power of will

Quotuliousness, A Very Kelo Christmas, http://bolditalic.com/quotuliousness_archive/003412.html (last visited Oct. 9, 2009).

¹⁸¹ Steven Slosberg, *Kelo's Holiday Greeting to Foes: 'I Curse You All,'* NEW LONDON DAY, Dec. 20, 2006.

¹⁸² Posting of Mark Memmott to USA Today on Deadline, http://blogs.usatoday.com/ondeadline/2006/12/not_a_merry_chr.html (Dec. 20, 2006, 15:54 EST).

¹⁸³ New London Historic Waterfront, Little Pink House—Kelo, <http://newlondonmainstreet.org/pub/listing/profile/4625/heritage/Little+Pink+House+++Kelo> (last visited Jan. 31, 2010).